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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77/130

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.
and RUTH NEWMAN,

Petitioners,

-against-

AAACON AUTO TRANSPORT, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

QUESTIONS PRESENTED

1. Where petitioners defaulted by their failure to properly assert before a state court alleged invalidity of the venue clause in an arbitration agreement, does the preclusion of that issue by application of

state statutory law, resulting from said default, constitute a violation of the "supremacy clause" of the Constitution?

2. Where petitioners failed to raise a defense before a trial court, do the rules of said court, precluding petitioners from raising the issue upon appeal, constitute a violation of the "supremacy clause" of the Constitution?

3. Assuming arguendo, that a clause in arbitration agreement specifying the venue of arbitration were void as unlawful, would the enforcement of the severable remainder of the arbitration agreement constitute a denial of constitutional rights of the petitioners?

4. Where a motion for arbitration is filed in a court, do the provisions of state and federal arbitration acts which mandate that the venue of the hearing on arbitration and the arbitration itself be at the place the motion is filed, constitute a

denial of constitutional rights of the petitioners?

5. Where there is a split in the Circuits concerning the validity and enforceability of the venue portion of a contract in interstate commerce for arbitration, does the enforcement of the contract by the highest court of the State of New York constitute a denial of constitutional rights of the petitioners?

STATEMENT OF THE CASE

A. The Underlying Transaction

The agreement between respondent-carrier Aaacon Auto Transport, Inc. ("Aaacon") and petitioner-shipper Ruth Newman, consisted of two documents:

a. the "Freight bill-order form" -- which was admittedly signed by Newman. Her signature appears under the words in large capital letters, "SUBJECT TO AND INCORPORATING ALL PROVISIONS OF CARRIER'S BILL OF

LADING". This freight bill-order form (RA 27*) was merely an "order" and not the agreement as was erroneously characterized by the trial court.

b. the "bill of lading agreement" itself (RA 28) -- consisting of 28 lines of bold faced type -- between Aacon and Newman containing a provision for arbitration of claims at New York City (RA 28). The arbitration provision was printed in the bill of lading immediately above Newman's signature.

Newman signed both documents (RA 50, 51).

After the transport of the car, Newman asserted a claim for alleged damage to the vehicle. She was paid in full by automobile insurance in a policy issued by petitioner State Farm.

Newman is, therefore, merely a technical petitioner in the action. Her subrogee, State Farm, is the real party in interest as a result of the subrogation agreement between Newman and State Farm. (Hereinafter, "State Farm"

* "RA" indicates pages from the Record on Appeal to the New York Court of Appeals.

refers to petitioners Newman and State Farm collectively, unless otherwise indicated).

State Farm filed a claim with Aaacon. Subsequently, the claim was denied on the ground, inter alia, that Aaacon was entitled to the benefit of insurance under its tariff. Cf. U.S. v. Auto Driveaway, 464 F.2d 1380 (7th Cir. 1972).

The transportation had contacts with New York. As set forth, infra, the investigation of the claim was conducted by Aaacon's New York personnel (RA 96, 97). Correspondence, insurance policies and proof of loss were kept in the custody of Aaacon's New York personnel, Aaacon's tariff, and claims record entries were prepared by New York personnel (RA 96,97). The contract, the driver selection and payments were screened and approved by Aaacon's New York personnel (RA 96, 97).

Thus, New York had clear contacts with the dispute in question. No Aaacon employee in

Illinois was, or is, familiar with the issues or claim, or can testify with regard thereto. From State Farm's side the consignor Newman and the consignee Jack Snyder are both California residents and do not live in Illinois (RA 28, 53, 54). The Newman affidavit of October 16, 1973 (RA 47) submitted to the New York trial court was made in Los Anegles where Mrs. Newman resides. The driver in question, the other party to the contract, was a resident of Vermont. Clearly, Illinois is an inconvenient forum for the settlement of this dispute.

B. Procedures Seeking Arbitration

State Farm commenced an action in a state court in Chicago, Illinois to recover for said alleged damage to the Newman automobile.

On July 13, 1973, Aaacon served both State Farm and Newman with Notices of Intention to Arbitrate (RA 35). Said notices were served upon both petitioners in strict conformance with the New York

Arbitration Act, CPLR 7503(c). Each was served by certified mail, return receipt requested. Both petitioners failed to move within the required statutory period of twenty days to stay the demanded arbitration.

Aaacon then initiated the proceeding in the Supreme Court, New York County, Special Term Part I (hereinafter the "trial court") to compel arbitration in accordance with the terms and provisions of the agreement, the Federal Arbitration Act (9 U.S. Code Sec. 4) and the New York Arbitration Act (CPLR 7503) and further, to stay petitioners from proceeding with said Illinois action at law pending arbitration.

Contrary to State Farm's assertion in its Petition to this Court, State Farm opposed arbitration before the trial court <u>solely</u> on two grounds:

1. that Newman did not read the agreement (which she admittedly signed); and
2. that the contract was adhesive.

State Farm did not raise the question of invalidity of the contract to the trial court.* State Farm also sought to transfer a hearing of both of these issues to Illinois under the doctrine of forum non conveniens. Thus, as stated in the affidavit of one of State Farm's attorneys, Paul A. Heyman, Esq., dated October 31, 1973 (RA 62):

> "...the issues at bar are:
>
> (a) whether Mrs. Newman, an unknowing consumer can be bound by a grossly unfair arbitration clause buried in the uniform densly packed print of an adhesion contract, and
>
> (b) whether this proceeding should be dismissed under the doctrine of forum non conveniens, since Illinois is the only forum convenient to all the parties and witnesses in any litigation over the validity of the arbitration clause."

State Farm asserted a standardized sham allegation in affidavits it drafted for its

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* State Farm dedicates 4 pages of its petition to this Court attempting to show that the issue of invalidity under 49 U.S. Code Sec. 20(11) was raised, but cannot cite any documents before the trial court to substantitate its position, except to refer to letters sent to the trial court 3 months after the matter was heard.

insureds including Mrs. Newman to the effect that they were "unaware" of the terms of the transportation agreement under which their vehicles were transported. For example, as noted on appeal, a comparison of paragraph 18 of the Newman "affidavit" (RA51) with an "affidavit" prepared by State Farm in another litigation against Aacon (Aacon Auto Transport, Inc. v. State Farm (Romagnoli)), 537 F.2d 648 (2d Cir. 1976), cert den., 45 U.S.L.W. 3643) reveals assertions that are virtually identical.

In the instant case, Newman swore in the October 16, 1973 affidavit (RA 51):

> "I do not recall whether or not I read any or all of the uniform, closely packed print on this form. If I did, then I did not see any provisions about arbitration."

In the other litigation against Aacon, State Farm's insured swore on April 19, 1974:

> "I do not recall whether or not I read any or all of the uniform, closely packed print on the reverse side of the freight bill

> "order form. I certainly never saw and was never apprised of any provision about arbitration."

This type of sham allegation has been condemned by various courts. Cf. Aero-Backer v. Allied (NYLJ, 3/4/76, p. 5, col. 1, 2, 3, Spec. Term, Part I, Supt. Ct. NY County); with National Equipment Rental Ltd. v. Szukhent, 375 U.S. 311 (1964).

Instead of deciding these issues, the trial court sent the matter to Illinois:

> "the State of Illinois is as well able to deal with the question of arbitrariness (sic) or the enforceability of the arbitration clause as is this Court..."

The Appellate Division, First Department reversed on the basis of its holding in a similar case, Aacon Auto Transport, Inc. v. Rosenbaum (Ohio Casualty Insurance Co.),50 AD.2d 180, 376 NYS.2d 548 (1st Dept. 1975),* annexed

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* The Appellate Division sent to the arbitrator all questions relating to the agreement between the parties, including all of the issues raised by State Farm before the trial court. Thus, whether the contract was "adhesive" and whether Newman was bound by the execution thereof are issues prpperly and

to State Farm's Petition to this Court Addenda 6a-11a.

Upon further appeal by State Farm, the New York Court of Appeals affirmed and held that State Farm, having failed to move before the trial court under CPLR 7503(c) for a stay of arbitration on the ground of invalidity, was precluded from raising that issue.

It is from this ruling that State Farm sought to petition this Court.

(cont) solely for the arbitrator to determine under both Federal and New York decisions. Prima Paint v. Flood & Conklin, 388 U.S. 395 (1967); John Wiley & Sons v. Livingston, 376 U.S. 543 (1964); Weinrott v. Carp., 32 NY.2d 190, 344 NYS.2d 838 (1973).

The rationale of the above-cited cases is that where a broad arbitration clause is included in an agreement between the parties, it is severable and it authorizes the arbitrator alone to determine any questions going to the making of the entire agreement. Robert Lawrence Co. v. Devonshire Fabrics Co., 271 F2d 402 (2d Cir. 1959), cert. den. 364 U.S. 801.

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REASONS FOR DENYING THE WRIT

The decision of the New York Court of Appeals did not involve a misapplication of federal law, much less a constitutional issue. The question before the New York Court of Appeals was whether State Farm, having defaulted in following the procedures set forth in New York CPLR 7503, was precluded from raising issues of invalidity of the contract. There is no question that State Farm was given due notice, due process and a fair opportunity to raise the question of invalidity. There is no question that federal law on the question of invalidity would be applied by the New York courts.

The case is simply the failure of petitioner to plead a federal defense in a state court action. The failure to plead under proper state procedural law simply bars the issue. There is, therefore, no question of the New York Court's failure to give full faith and credit to Federal law.

Moreover, under the language of the Federal Arbitration Act, 9 United States Code Sec. 4, and the New York State counterpart, CPLR 7501 et seq., even if the venue clause in the arbitration agreement was stricken, the rest of the clause would be enforceable under the terms of the two arbitration statutes aforementioned. The sole place where the remainder of the contract can be enforced is the district in which a petition for arbitration is filed -- in this case New York. Both parties were amenable to service of process in New York and both appeared through counsel. Jurisdiction was, therefore, vested in the New York courts and jurisdiction was never contested. Accordingly, even if the venue provision of the arbitration agreement is deemed void or unlawful, enforcement of the remainder of the contract requiring arbitration at the place where the petition is filed (in this case New York) is lawful and raises no constitutional issues.

Finally, State Farm's interpretation of the "federal law" is incorrect as is briefly discussed below.

SUMMARY OF THE ARGUMENT

The effect of New York CPLR 7503 which governs the procedural aspects of enforcement of arbitration requires a party upon whom a Notice of Arbitration is served to move within twenty days (the same period of time for answering a summons) to raise any question of the invalidity of the arbitration agreement. State Farm failed to do so in the instant case. The New York courts have not failed to apply the federal law and have merely applied New York procedures which, even State Farm acknowledges, is appropriate. These procedures in no way conflict with the federal law nor does their application raise a constitutional issue.

Additionally, State Farm, having failed to raise before the trial court the question of the invalidity of the venue of arbitration could not under the rules of proper practice, raise the issue upon appeal.

State Farm avers that the venue clause (providing for arbitration at New York City)

in the arbitration agreement is void under federal law. While Aacon avers that the federal law is not clear on this issue -- and that there is currently a split in the Circuits -- the venue clause if deemed void or stricken or otherwise severed from the rest of the arbitration agreement, is not necessary for the conclusion reached by the New York Court of Appeals. This results from the fact that the Federal Arbitration Act and the New York arbitration Act, 9 U.S. Code Sec. 4 and CPLR 7503 both provide that the place of arbitration shall be the forum in which a petition for arbitration is filed, regardless of any contract provision to the contrary or contractual silence on the issue. Had there been no venue provision in the arbitration agreement the hearing on arbitrability and the arbitration itself would have taken place at New York by Congressional mandate since a petition for arbitration was filed at New York. This, of course, assumes arguendo the invalidity of the venue provision and

assumes that State Farm had not defaulted in raising the issue.

Finally, Aacon respectfully notes that should this Court grant certiorari it will set forth in appropriate briefs a full discussion of the validity of the venue provision rather than burdening the Court with a full discussion of the question at this time.

POINT I

CPLR 7503 DID NOT PRECLUDE THE ENFORCEMENT OF FEDERAL LAW

State Farm asserts that the provisions of CPLR 7503 cannot be applied to limit the period of time within which to challenge the validity of the arbitration agreement.

It has been hornbook law from the earliest days of American jurisprudence to the present that Federal statutes will be enforced in state courts in accordance with state procedural rules. This is especially true where state law provides a period of limitation.* Shipp v. Miller, 15 U.S. 316 (1817); Cope v. Anderson, Ohio & Pa., 331 U.S. 461 (1947); Brenkmeir v. Missouri Pacific Ry Co., 224 U.S. 268 (1911); N.V. Phillips' Gloeilampnfabrieken v. Automic Energy Commission, 316 F2d 401

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* State Farm acknowledges to this Court in its Petition for Certiorari (p. 22 n. 11) annexed hereto as Addendum "1" that state court procedures govern the application of Federal substantive law. That is all that has occurred here.

(DC CA 1963); Moviecolor Ltd. v. Eastern Kodak Co., 288 F2d 80 (2d Cir. 1961) cert. den. 368 U.S. 821.

Importantly, CPLR 7503(c) does not, by its terms, preclude a party to an arbitration agreement from raising any issue concerning the validity of the agreement under state or federal law. It merely sets forth the period of time and pleading procedure for joining certain issues. CPLR 7503 is consonant with the substantive Federal law, permitting the parties to contest validity on any ground should they elect to do so.

In reality, what State Farm is faced with is not a statute precluding it from raising questions of validity, but rather its own default by its failure to follow procedures to assert its rights. Clearly, State Farm's right to raise the validity of the venue of arbitration is waivable by default, or by the application of rules of proper pleading. As noted by the New York

Court of Appeals, per Breitel, C.J., during cral argument, even Constitutional rights are so waivable. John v. Zerbst, 304 U.S. 458 (1938); Wall v. Parrot Silver & Copper Co., 244 U.S. 407 (1917).

The 20 day period of time in which to raise questions of the validity of arbitration agreements under CPLR 7503(c) is the same as the period within which to answer a summons under New York procedure. State Farm acknowledges it was properly served with a written notice which stated both the time within which to act and the consequences of a failure to do so. State Farm acknowledged in oral argument before the New York Court of Appeals that it had counsel both in Illinois where it was served, and in New York where the matter was to be heard. Accordingly, neither due process nor the application of a federal substantive law is at issue.

Since State Farm was given a fair opportunity to raise the issue of validity, its failure to do so does not place CPLR 7503(c) in conflict with federal law. It merely means State Farm has defaulted under the rules of procedure for New York State courts.

The cases relied on by State Farm, such as Kalb v. Feuerstein, 308 U.S. 433 (1940), do not hold to the contrary. The Court in Kalb held merely that under the Bankruptcy Act state courts are ousted of jurisdiction. In the instant case, the Federal Arbitration Act is enforceable in both state and federal courts. Further, the New York Arbitration Act is practically on all fours with its federal counterpart. Weinrott v. Carp, 32 NY2d 190, 344 NYS2d 838 (1973). Thus, exclusivity of federal jurisdiction is not at issue as it was in Kalb.

The other group of cases cited by State Farm, wherein federal law is applied to the exclusion of state law, deal mainly with

state laws which alter the liability of an employer under FELA by the application of state rules for determining negligence. For example, in Arnold v. Panhandle & S.F.R. Co., 353 U.S. 360 (1957) cited by State Farm, the Court held that based on the same facts, a federal court would have found different liability from that found by the state court. Such cases are irrelevant to the instant case since the issues herein are procedural only -- proper pleading -- and since the result arose solely from failure of State Farm to observe the law, and not from the application of different substantive rules than would obtain in a federal court.

Surely no one could challenge an FELA decision in favor of a defendant resulting from the plaintiff's default or where the plaintiff had failed to properly file pleadings in a state court hearing. So too in the instant case, CPLR 7503 deprived State Farm of no rights, nor did it alter the

federal substantive law concerning arbitration. It merely enunciated the method of proceeding -- which State Farm chose to ignore at its own peril.

POINT II

THE VENUE PROVISION, IF VOID AND DEEMED STRICKEN, IS NOT NECESSARY TO THE NEW YOUR COURT OF APPEALS' FINDINGS

State Farm avers the portion of the agreement covering the venue of arbitration is void as contrary to federal law. This is more fully discussed hereafter. However, if the provision for the venue of arbitration at New York were severed and stricken, or had there been no mention, ab initio, of the venue of arbitration in the agreement between the parties, Aaacon's petition to arbitrate herein, served and filed in the New York State Courts or New York Federal Courts would still automatically require an order directing arbitration in New York. This follows from the clear language of both the Federal and New York Arbitration Acts, 9 U.S.Code Sec. 4 and CPLR 7503 which mandate the venue of arbitration to be the place where a petition therefor is filed, regardless of contractual silence or even contractual agreements to the contrary. 9 U.S. Code Sec. 4; CPLR 7503; Aaacon v. Ninfo, 490 F2d 83 (2d Cir. 1974); and Continental Grain Co. v. Dant & Russel, 118 F2d 967 (9th Cir. 1941).

Congress and New York legislature have each mandated the place of arbitration. These legislative directives override any contractual agreement or discretionary rule to the contrary:

> "The question is whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate. The answer to that can only be in the affirmative. Ant it is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of 'control over interstate commerce and over admiralty'.
>
> * * *
>
> Federal courts are bound to apply rules enacted by Congress with respect to matters--here, a contract involving commerce--over which it has legislative power." (Citations omitted) (Emphasis added)

Prima Paint vs. Flood & Conklin, 388 U.S. 395, 405, 406 (1966).

Congress not only preempted the venue issue by the enactment of the language of 9 U.S.C. Sec. 4, but intended it to extend to all arbitration arising out of interstate transportation:

> "...the control over the interstate commerce (one of the bases for the legislation) reaches not only the

"actual physical interstate shipment of goods but also contracts relating to interstate commerce."
HR Rep. No. 96 68th Cong. 1st Sess.1.
(Emphasis added)

Considering only the controlling Federal law, the Ninth Circuit Court of Appeals in Continental Grain v. Dant & Russel, 118 F2d 967 (9th Cir. 1941) has held that the legislature has the power to mandate to the courts the place of hearing issues on the making of an agreement to arbitrate as the place where a petition therefor is filed -- even though the parties had agreed to arbitration elsewhere:*

> "The statute expressly provides that the hearing and proceeding shall be within the district in which the petition for an order directing the arbitration is filed...
>
> * * *
>
> The appellant challenges the right of the court to order the arbitration within the district of Oregon because such an order does not conform to the agreement of the parties for an arbitration in New York....If there could be any

* The New York Arbitration statute CPLR 7501, et seq. contains practically identical language. Matter of Weinrott (Carp) 32 NY2d 190 (1973).

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> "doubt of the power of the legislature to limit the right of arbitration to one conducted within the jurisdiction of the district court ordering the arbitration, it must be dispelled by the consideration that Congress could attach any limitation it desired to the right to enforce arbitration in the federal courts, that it has made a condition that the arbitration be held in the district where the court sits, that the contract in question was executed with a knowledge that Congress had so provided, and that the appellant had invoked the jurisdiction of a court other than that having jurisdiction in New York to enforce the agreement." (Emphasis added)

Similarly, the Second Circuit in Farr & Co. v. Cia. Intercontinental de Navegation, 243 F2d 342, 346 (2d Cir. 1957) stated:

> "Section 4 of the Arbitration Act requires when parties have agreed to arbitrate, the arbitration be had in the district where the petition is filed. The parties are presumed to have contracted with notice of this venue provision, and since the arbitration was to take place in New York and 'This submission may be made a rule of court by either party', they consented to the jurisdiction of the district court in New York, where the petition was filed. Although New York cases are not controlling on us, their reasoning supports this conclusion." (Emphasis added).

Accord: Industrial Y Frutera Columbia v. The Brisk, 195 F2d 1015, 1016, 1017 (5th Cir. 1952).

More recently, the Second Circuit Court of Appeals in Aacon Auto Transport, Inc. v. Ninfo, 490 F2d 83 (2d Cir. 1974), in a unanimous decision, held that the Federal District Court in which the petition is filed under 9 U.S. Code Sec. 4 must hear issues of the making of the arbitration agreement and that motions for change of venue of the type sought by State Farm from the New York Court of Appeals, must be rejected as a matter of law.

The issue in Ninfo is on all fours with the issue herein. In Ninfo, respondent sought to attach the arbitration on the same grounds as State Farm raised below. Respondent also sought to have the venue of litigation on the issue of the making of the agreement transferred to another district under the Federal forum non conveniens statute, 28 U.S. Code 1404(a)*. In the instant case, State Farm seeks the same relief under the

* Contrary to State Farm's allegation to the New York Court of Appeals and as the reported case clearly indicates, the appeal in Ninfo was argued by attorneys for both sides and was not "unopposed".

New York forum non conveniens statute, CPLR 327.

The Second Circuit in Ninfo ruled, inter alia;

> "In the memorandum opinion below, the court indicated that the Ninfo affidavit in opposition to the Aaacon motion 'suggests' that there is a question as to whether or not the agreement was ever entered into, or if it was whether Ninfo realized that it called for arbitration of all disputes in New York County since the provision appeared inconspicuously toward the end of the boilerplace of the shipper's standard form which might render it invalid as against public policy. The court concluded that this presented issues of fact which need not be decided here, but could be resolved in the more convenient federal forum in Wisconsin. 9 U.S.C. Sec. 4 however, provides in pertinent part:
>
> 'The court shall hear the parties and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings under such agreement shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.'

> "Since the agreement on its face provides for arbitration in New York and since the petition was filed in the Southern District of New York, the statute mandates that the court below proceed summarily to a trial of the issues as to the making of the agreement. Aacon Auto Transport, Inc. v. Tearatiller, 334 F. Supp. 1042, 1044 (S.D.N.Y. 1971); Lawn v. Franklin, 328 F. Supp. 791, 793 (S.D.N.Y. 1971). It follows that the court below lacked the power to order the transfer of the case to Wisconsin. See Farrell v. Wyatt, 408 F.2d 662, 664-65 (2d Cir. 1969)." (Emphasis added)

The reasoning in Ninfo has never been rejected or distinguished by the Second Circuit or any other court. Accordingly, Ninfo is hardly the "dictum", nor has it "begun" to be "disowned" by the Second Circuit, as State Farm had averred in its brief to the New York Court of Appeals.

Although State Farm avers Ninfo to be "bad law" (Petition p. 23, n.11), China Union Lines v. Steamship of 1949, 136 F. Supp. 597 (SDNY 1955) and a long line of Federal cases heretofore cited support interpretation of the statute given by the Second Circuit in Ninfo. The Court in China Union Lines after quoting 9 U.S. Code Sec. 4 noted that an agreement

to arbitrate in New York would require arbitration in Texas where the petition to compel arbitration was filed in Texas:

> "...libellant filed its petition for an order directing arbitration in the Southern District of Texas. It did not file a similar petition in this district. The only district within which the arbitration could proceed by force of a petition and court order would be the Southern District of Texas." (Emphasis added)

The New York Appellate Division, First Department, has also followed this reasoning in Aacon Auto Transport, Inc. v. Harry Rosenbaum, 50 App. Div.2d 180, 376 NYS.2d 548 (1st Dept. December 1975):

> "...under the legislative mandate of CPLR (Art. 75) and the Federal Arbitration Act (9 U.S.C. ss 1, et seq.) it appears that we have neither the authority nor the power to refer the matter for decision to another court, particulary to a court in another State. (Emphasis added)

Accordingly, no Federal case or state case has ever been cited by State Farm nor has any authority been uncovered by Aacon which ever upheld an order changing the venue of a petition to compel arbitration where the petition was filed in a particular forum.

Thus, inasmuch as the parties were amenable to process in New York and appeared generally before the New York Courts, and inasmuch as the petition to arbitrate was filed in New York, the place of arbitration was mandated by statute to be New York--without any reference to the venue provision in the contract. Farr & Co. v. Air Intercontinental de Navagation, 243 F2d 342, 346 (2d Cir. 1957).

Clearly, therefore, assuming arguendo that under "federal law" the venue portion of the arbitration clause was void*; assuming

*All that the Second Circuit decided in Romagnoli, supra, is that a contract providing for arbitration at New York violated 49 U.S. Code Sec. 20(11).

The split in the Courts over this issue is discussed elsewhere herein. The correctness of the Second Circuit in Romagnoli will be briefed to this Court if the petition for certiorari is granted. It is sufficient to note at this point that respondent avers Romagnoli is incorrect as a matter of statutory construction and legislative intent. It should also be observed that the prospective effect of the New York Court's decision is moot since the venue of arbitration was permanently removed from Aacon's tariff and contracts in August, 1976.

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arguendo that this issue had been properly raised by State Farm before the trial court; and assuming arguendo that CPLR 7503(c) was not applicable--the Courts of New York rightly held the rest of the arbitration provision enforceable at New York where the petition was filed.

POINT III

STATE FARM ERRS IN CHARACTERIZING THE "FEDERAL LAW" AS HAVING DECLARED THE WHOLE ARBITRATION AGREEMENT BETWEEN THE PARTIES "A NULLITY"

State Farm's Petition for Certiorari is based upon the erroneous assumption that the arbitration agreement between the parties herein is a "complete nullity". This is an error. State Farm's averments do not represent "federal law". Moreover, the case State Farm relies on, Asacon v. Romagnoli, 537 F2d 648 (2d Cir. 1976) cert. den. 45 U.S.L.W. 3643 (1977), only deals with the venue portion of the arbitratiam provision, not the whole agreement to arbitrate.

State Farm has erred in its characterizations of the holdings of the Interstate Commerce Commission and of the Federal Court in Romagnoli. Nowhere has either tribunal ever declared that arbitration per se between a carrier and a shipper (or in this case, an insurer of a shipper) is precluded by Federal statute or by administrative

determination. On the contrary, the Interstate Commerce Commission has already put itself on record as holding that arbitration of shipper-carrier disputes is lawful. In Ex Parte 263, 340 ICC 515, 582 (1972) the Commission held that arbitration:

> "is not proscribed by any portion of the Interstate Commerce"

and that the Commission knew of:

> "no inherent impediments to placing arbitration clauses in bills of lading for separate execution." Id at 587. (Emphasis added)

The Commission's decision in Aaacon Auto Transport, Inc. Investigation & Revocation of Certificate, 124 MCC 506 (1976) specifically declined to adopt the hearing examiner's recommendation (which recommendation State Farm erroneously characterizes as a "Commission decision") on the lawfulness of providing for the venue of arbitration. The Commission stated at 506:

> "A resolution of the issues at hand does not, we believe, require us to determine whether...the incorporation

> "of an arbitration clause into Asacon's bill of lading is acceptable or even desirable."

The Commission went on to state that it was not ruling on the legality of the provision for venue of arbitration, but was only discussing the manner in which it was used in certain cases.

Similarly, the Second Circuit Court of Appeals in Romagnoli, supra, did not hold that the arbitration of shipper-carrier disputes was unlawful. Nor did it indicate that it would not enforce an arbitration agreement per se where a petition for arbitration was filed by a carrier at New York. The Second Circuit Court specifically confined itself to the lawfulness of the inclusion of a requirement that the venue of arbitration be at New York as a contract term. Thus, enforcement of arbitration itself is not against the federal law.

Until this Court makes a declaration concerning the validity of contracts providing for arbitration of interstate carrier-

shipper with venue specified, the states will seek to apply the law as they believe their courts should. La Bonte v. New York, N.H. & H. R. Co., 167 N.E.2d 629, 632, (S.Ct. Mass. 1960).

This is especially true where, as here there is a split in the Circuits. Thus, in Aacon v. Jacobson, 475 F2d 1394 (3rd Cir. 1973), the Third Circuit upheld the enforceability, validity and conscionability of the arbitration agreement here at issue against the same attack raised in the Second Circuit in Aacon v. State Farm (Romagnoli) - that it violated 49 U.S. Code 20(11). The issues raised before the Third Circuit in Jacobson were the identical issues considered by the Second Circuit in Romagnoli. In light of split in the Circuits, it is respectfully urged that an analysis of the Third Circuit decision in Jacobson is the correct one.*

* Contrary to the characterization of the Second Circuit in Aacon v. State Farm Romagnoli), 537 F.2d 648 (2d Cir. 1976),

As heretofore noted, assuming arguendo Romagnoli were deemed to represent the "federal law", that case only dealt with the venue portion of the arbitration agreement in any event. The doctrine of severability has long been applied to arbitration contracts. Robert Lawrence Co. v. Devonshire Fabrics Co., 271 F2d 402 (2d Cir. 1959) cert. den. 364 U.S. 801. Prima Paint v. Flood & Conklin, 388 U.S. 395 (1967). Cf. Kass Realty Corp. v. Stanley Company of America, 226 F2d 54 (DC Cir. 1955). Clearly, the enforcement of the rest of the arbitration agreement--to the exclusion of the severable venue provision--is proper. Ex Parte 263, 340 ICC 515, 582 (1972).

(cont.) cert. den. 45 U.S.L.W. 3643 (1977) the Third Circuit in Aaacon v. Jacobson, did not issue an order or opinion "from the bench". Rather, it issued a written opinion. Counsel for Aaacon has contacted the Third Circuit staff attorney, as well as its Philadelphia counsel, and it has been advised that the opinion of the Third Circuit is citable and binding. This conclusion accords with 12 ALR.3d 892, 897 that a decision upholding the enforeability of an arbitration agreement must of necessity, determin its validity of the law. The Second Circuit corrected this error by issuing an errata to its decision in Romagnoli.annexed hereto as addendum "2".

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State Farm has also sought to rely on a Commission employee's letter as setting forth "federal law" which it claims the New York Court of Appeals failed to be bound by. This letter was the basis of the Romagnoli decision which is at odds with Aacon v. Jacobson and which will be discussed at length should this Court grant certiorari. However, the 'McCarthy letter of 1971" was not an order of the Commission and was superseded by the Commission approval in 1972 of Aacon's tariff provision authorizing arbitration at a stated venue. Thus, in 1972 the Commission itself had approved and accepted Aacon's tariff provision Rule 20 authorizing the placement in Aacon's bill of lading of a provision for arbitration and the venue thereof (RA 167, 169).

Accordingly, neither the McCarthy letter, nor the hearing officer's recommendations in Aacon Auto Transport, Inc.--Investigation

and Revocation of Certificate, 124 MCC 493 (1976), pet. for review denied, 553 F.2d 93 (2d Cir. 1977) to which State Farm refers, were final orders of the Commission.* These matters will be more fully discussed on the merits should this Court grant the Petition for certiorari.

* The Commission declined to adopt the hearing officer's conclusions in MC-C-7287 cited by State Farm. The Commission's order following 124 MCC 514 (1976) requires compliance with its report, not that of the hearing officer. The Commission therein specifically declined to rule on the validity of arbitration at a given location 124 MCC 514. The Commission did state that its method of use by Aacon might give rise to discouragement of filing of claims -- an issue not here relevant since the claim of respondent was clearly filed and thoroughly prosecuted.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

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ADDENDA

[11] This quotation, of course, has a well established corollary—that procedural questions that do not affect the merits, or the substantive outcome, are governed solely by state law in state courts, even if federal substantive law is applicable. This principle is stated here to point out that there are other federal questions, besides the Constitutional one, that this Court might wish to comment on if it reviews this case.

First, the Appellate Division here, and perhaps the Court of Appeals, was obviously confused as to whether state or federal law was applicable on the question of *forum non conveniens*, citing only federal authorities for the proposition that *"forum non conveniens* does not apply where, as here, a 'special venue act' is invoked. *Baltimore & Ohio R. R. Co.* v. *Kepner*, 314 U.S. 44. . . ." (See *Aaacon* v. *Rosenbaum*, at 50 A.D.2d 182, appended to this petition, at 9a-10a.) This Court has already reversed one state court on the question of *forum non conveniens*. *Southern Ry. Co.* v. *Mayfield*, 340 U.S. 1, 3-5 (1950). Apparently, once is not enough. (The shipper relied extensively on *Mayfield*, in all three state courts, for the proposition that the shipper's motion to dismiss on grounds of *forum non conveniens* was governed solely by state law (CPLR 327), even though federal substantive law was applicable.)

Second, this Court might wish to take the opportunity to point out affirmatively that, in federal courts, the doctrine of *forum non conveniens* is as applicable to applications to enforce arbitration agreements, even those with limited venue provisions such as Aaacon's, as in any other action or proceeding. This point is a matter of some concern in light of *Aaacon Auto Transport, Inc.* v. *Ninfo*, 490 F.2d 83 (2d Cir. 1974). *Aaacon* v. *Ninfo* stated as a matter of law that 28 U.S.C. §1404(a), the federal *forum non conveniens* statute, could not be applied to Aaacon's petition under 9 U.S.C. §4 to enforce its arbitration clause, in view of the venue limitation in the clause. *Ninfo* was relied on by the Appellate Division below (see the appendix to this petition at 9a-10a).

Aaacon v. *Ninfo* is obviously bad law. It outrages common sense that a party could be able to impose inconvenient and inappropriate venue on an adversary, for testing the validity of an arbitration clause in an adhesion contract, by inserting a venue provision in the arbitration clause which, by virtue of the limited venue provision or for other reasons, might be determined on the merits, as in the case at bar, to be entirely null, void, and unenforceable *ab initio!* Moreover, 28 U.S.C. §1404(a) provides for transfer of *"any* civil action to any other district or division where it might have been brought." Emphasis added. This Court has already held that the word "any" in §1404(a) means just that. *Ex Parte Collett*, 337 U.S. 55 (1949), pointing out (at 57-8, 60-1) that 28 U.S.C. §1404(a) legislatively overruled *Baltimore & Ohio R.R. Co.* v. *Kepner*, *supra*, and related cases, relied on by the Appellate Di-

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vision at Aaacon's urging. A motion to enforce an arbitration agreement, even one with a limited venue provision, can, technically speaking, be brought in "*any* United States District Court which, *save for such agreement*, would have jurisdiction. . . ." 9 U.S.C. §4; emphasis added. The statutes thus make clear that any motion to enforce an arbitration agreement, even one with a limited venue provision, can be transferred, "for the convenience of parties and witnesses, in the interest of justice", 28 U.S.C. §1404(a), to any other "District Court which, save for such agreement, would have jurisdiction . . .", 9 U.S.C. §4. Any possible prejudice feared on account of a transfer, in relation to Aaacon's alleged right to arbitration in the venue provided in the agreement if the agreement and the venue limitation were found valid by the transferee court, could be avoided by conditioning transfer on an appropriate stipulation. (These points were all painstakingly explained, with appropriate citations, in the appellate courts below.)

SECOND CIRCUIT ERRATA SHEET

ERRATA ON OPINIONS 1975 TERM

Page 4088, line 20—delete "479" and insert "476" in place thereof.

Page 4088, footnote 11, 5 lines up from bottom of page—delete "as" and insert "a" in place thereof.

Page 4089, footnote 12, 3 lines up from bottom—delete "opinon" and insert "opinion" in place thereof.

Page 4095, footnote 16, 7 lines up from bottom of page—before "We" insert "quotation marks".

Page 4096, footnote 18, 6 lines up from bottom of page—delete *"Bankers Life & Co.,"* and insert *"Bankers Life & Cas. Co.,"* in place thereof.

Page 4097, line 25—change "§301(1)" (i.e., number one) to "§301(l)" (i.e., letter el).

Page 4098, line 20—delete "More" and insert "Most" in place thereof.

Page 4107, line 12—delete "defend" and insert "prosecute" in place thereof.

Page 4112, line 2—delete "a shipper" and insert "an employee" in place thereof.

Page 4118, lines 1 and 2—delete entirely and insert "Cir. 1973), this court affirmed from the bench and in reliance on that affirmance the Third Circuit affirmed by order two district court cases granting" in place thereof.

Page 4121, line 30—after "court cases, *e.g.*," insert *"Auacon Auto Transport, Inc.* v. *Echols*, No. 75 Civ. 1268,".

Page 4279, line 2—after "envelope of money." insert "In addition, Hall testified to one occasion on which she visited Monell in jail while Mrs. Grant and Doulin were meeting outside; on being introduced to Hall afterwards, Doulin remarked that she must be "the girlfriend of the bad boy." ".

Page 4279, line 7—after "bation." insert "Shapiro also recounted a statement by Doulin that he had "put in a good word, or done a favor . . . for a grandson of an old dear friend." ".

Page 4283, line 23—after *"Id."* insert "Such statements are admissible if the trial judge finds independent evidence that the defendant participated in a conspiracy with the declarant. *United States* v. *Geaney*, 417 F. 2d 1116 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970). Doulin's admission to Shapiro that he had put in a good word for

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